Notes

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"The law is the true embodiment
Of everything that's excellent,"

says the Lord Chancellor in *Iolanthe*. If that be so, it follows that the law must contain a great deal of Latin, and as a matter of fact we know that it does, both in substance and in form.

One of the forms in which Latin is embodied in the law is in the form of maxims. Some of them, such as *caveat emptor* and *de minimis non curat lex*, have had a history of their own and are not unknown to many who have never taken upon themselves the kindly yoke of the law. The important thing to remember is that these maxims are in no sense wise saws, cited for their illustrative value, and introduced with an apologetic *ut aiunt*, as they might be used in Bacon's *Essays*, or by Sir Thomas Browne. They are in the fullest sense legal principles. They are rules to be applied and followed in the decisions of concrete cases, as fully as legislative enactments or the judgments of authoritative tribunals. If nothing else could convince the layman of that, the portly volumes of Broome's *Maxims* (eighth edition, by Chitty) as well as the collections of Wingate, Hulkerstone, and others, of earlier date, would leave no doubt as to the dread seriousness of the topic for lawyers and the weight accorded to it.

These maxims are of varied origin. Some come from the *Digest*, especially 50, 17, *De diversis regulis iuris antiqui*. Others were prepared in those idyllic days when judges and chancellors in England, solicitors, proctors, attorneys, clerks, and advocates, knew and used Latin for other purposes than that of passing an examination preliminary to their admission to the bar. At the present time, it may be, the presence of these phrases in ponderous decisions gives a certain flavoring of learning, a little musty *bouquet* to what seems a rather dry wine. But they are none the less used for a distinctly practical end, that of serving to subsume a complicated legal argument and of stating established law.

So, if necessity impels us to examine the case of *Banorgee* vs. *Hovey* (5 Mass. 11), decided in Massachusetts in 1809, we should read in the opinion of Mr. Justice Sedgwick, at page 36, the following: It is to be premised that the justice is speaking of the point at issue, namely, of an unauthorized change in a contract, which seemed, however, to have worked no appreciable harm to

the defendant. The court regards that fact as immaterial. "To this it would be a sufficient reply: *Non haec in foedera veni.* 'To this contract I have never assented.'"

Again in *Grew* vs. *Breed* (11 Meto. 567), decided in the same state in 1846, the court held (p. 575): "He (the surety) is entitled to the benefit of the maxim: *Non haec in foedera veni.*"

It is not merely Massachusetts, nor any particular epoch in which the maxim is used. In *Ritchie* vs. *Coates* (3 Yeats 531, 540), decided in Pennsylvania in 1803, we read: "Yates, J.: The plaintiff has contracted for one thing and has received another. He may justly explain, *Non haec in foedera veni.*"

In *Bethune* vs. *Dozier* (10 Ga. 235, 239 [1851]), Mr. Justice Lumpkin said: "*Non haec in foedera veni* is an answer in the mouth of the surety."

In 1863 in the case of *Ide* vs. *Churchill* (14 Ohio St. 383), Ranney, J., declared: "He (the surety) is entitled both at law and equity to make a short and conclusive answer, *Non haec in foedera veni.*"

And in New York in 1874 Justice Davis held, in the case of *Osgood* vs. *Toole* (1 Hun 167, 171), "The surety may always say: *Non haec in foedera veni.*"

And the maxim has re-echoed in even more ancient and—may it be said?—more august halls. The case of *Thorn* vs. *The City of London* was decided in the House of Lords in 1876 (1 App. Cases 120, 127). The contractor was sought to be compelled to do work different from that which he agreed to do. The Lord Chancellor (Lord Cairns) held he need not do it. "The defendant might have said: I entirely refuse to go on with the contract. *Non haec in foedera veni.*"

Every student of fourth-year Latin (rumor will have it that such persons are still to be found in schools outside of the paths of the Cocqucigrues) has of course at once placed the citation. In the *Aeneid*, iv. 337–39, in what was probably the most painful moment of a much-tried life, Aeneas says:

> Pro re pauca loquar. Neque ego hanc abscondere furto
> Speravi, ne finge, fugam; nec coniugis umquam
> Praetendi taedas, aut haec in foedera veni.

Doubtless the noble and learned Lord on the Woolsack was fully aware what the source of the maxim was. It may be, too, that the erudite justices of Massachusetts, New York, Ohio, Pennsylvania, and Georgia read Vergil constantly and remembered him well. But they make no mention of him. Literary quotations are not unknown in judicial opinions. They are relied upon for color and adornment. But this citation from Vergil is not ornamental. The poet does not appear in his singing rôles to give a graceful interlude to these painful discussions of contractual rights and obligations. The statement is referred to as a legal principle, established and conclusive. The Mantuan is here as plainly a jurisconsult as though he were Quintus Mucius in person.

The great *American Cyclopedia of Law and Procedure* (29 Cyc. 1058) cites the maxim in its appropriate place. So does Black's *Law Dictionary*. In Mr. Spencer's textbook on suretyship (1913), at page 294, it is called "the familiar maxim, *non haec in foedera veni*." In no instance is the Vergilian authorship mentioned. Assuredly, on his couch of asphodel, the author of *Sic vos non vobis* learns of that with an indulgent smile. Yet if Papinian and Ulpian and Gaius cited Homer with the same respect as a rescript of Divi Fratres, our ermined rulers might not hesitate to give Vergil a place by the side of Coke and Blackstone, Holt and Eldon.

Non haec in foedera veni! When the familiar words suddenly appear in this unexpected context, it needs no unusual imagination to see the courtroom dissolve before our eyes. The acrimonious debates of plaintiff and defendant are blown into space with the dust of their leathery parchments. The abstract analysis of the rights of principal and surety, of obliger and obligeo, appears as futile as the chewing of dry straw. And in their place there is a superb portico, bathed in African sunlight. A somewhat too richly attired Trojan is painfully framing a decision that is not his own. And facing him, with eyes ablaze and heaving breast, the royal Phoenician is trying to remember that she is a queen as well as a deeply wronged woman.

Strange that His Lordship and their respective Honors of New York and Massachusetts could go on quietly discussing contracts and breaches, discharges and indemnities, when in their ears there must have been ringing the wild invective:

Nec tibi diva parens, generis nec Dardanus auctor!

Apparently, however, they did. I do not undertake to explain it. *Non haec in foedera veni.*

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ON XENOPHON, *Anabasis* i.4.13

Reuss (*Kritische und exegetische Bemerkungen zu Xenophons Anabasis*, p. 11) regards the words τὸ μὲν δὴ πολὺ τοῦ Ἑλληνικοῦ οὕτως ἐπείσθη as a gloss: "Mit diesen Worten werden die Verhandlungen der Hellen mit Kyros abgeschlossen, während im Folgenden erst mitgeteilt wird, wie dieselben dazu kamen, Kyros Anerbietungen anzunehmen. Der Abschluss der Beratung wird I. 4. 17 berichtet: συνείπετο δὲ καὶ τὸ ἄλλο στράτευμα αὐτῷ ἅπαν, Menons Vorgehen bestimmte das Griechenheer, den Euphrat zu überschreiten. Was mit der Berschränkung τὸ πολὺ τοῦ Ἑλληνικοῦ gesagt sein soll ist nicht zu ersehen, im Widerspruch damit steht I. 4. 17, τὸ ἄλλο στράτευμα ἅπαν. Das erst in 17 das ganze Heer zum Uebergang sich entschliesst, ergiebt auch die